United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7633

IN THE

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ROBERT HIGH,

Plaintiff-Appellant,

—against—

SABENA BELGIAN WORLD AIRLINES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DISMISSING THE ACTION ON THE MERITS

This is an appeal under 28 U.S.C. 1291, Rule 4(a) Rules of Appellate Procedure, by plaintiff from an order and judgment of the United States District Court for the Eastern District of New York, entered November 22, 1976, upon the Memorandum Incorporating Findings of Fact and Order for Judgment of United States District Judge John F. Dooling.

Issues Presented for Review

The appeal presents the following issues for review:

(1) Has plaintiff established that the findings of fact by the District Court are clearly erroneous?

(2) Has plaintiff established any other grounds for setting aside the judgment and order of the District Court?

Statutes Involved

The relevant portions of the statutes involved are set forth in the Addendum hereof.

Statement of the Case

Nature of the Case

This is an individual action brought by plaintiff under 42 U.S.C., 1981 and Title VII of the Civil Rights Act of 1974, as amended, 42 U.S.C., Sections 2000e *et seq.*, in which plaintiff has sought an adjudication that defendant has violated Sections 1981 and Sections 2000e(2)(a)(1) and 2000e-3(a), an injunction against alleged continuing discrimination, an affirmative action program, back pay for alleged deprivation of right to equal employment and attorney's fees and costs.

The Proceedings Below

Following service and filing of an amended complaint ("complaint"), defendant moved to dismiss on the ground of lack of jurisdiction, and on further grounds that the portion of the complaint relating to 42 U.S.C., Section 1981, was barred by the applicable statute of limitations and, in any event, plaintiff was guilty of laches and not entitled to relief under Section 1981, as sought. Defendant's motion was denied by order entered April 26, 1976.

Thereafter, defendant joined issue denying the allegations of the complaint, and asserting that the complaint

failed to state claims upon which relief can be granted; the claims under 42 U.S.C., Section 1981, were barred by the applicable statute of limitations and in any event, plaintiff was guilty of laches and not entitled to relief with respect thereto.

After trial before United States District Judge John F. Dooling, pursuant to a Memorandum Incorporating Findings of Fact and Order for Judgment, an order and judgment was entered on November 22, 1976, dismissing the action on the merits. (Appellant's Appendix)

On December 7, 1976, plaintiff filed a Notice of Appeal from the final judgment entered in the District Court.

Summary of the Facts

Plaintiff's allegations as set forth in the complaint actually relate to disparate incidents.

The Court below made extensive and detailed findings based upon the evidence adduced.[1] These details need not be repeated here, except in summary form.

Plaintiff has held the position of Warehouseman (currently known as Cargo Serviceman), a position covered by a collective agreement between defendant and Local #504, Transport Workers Union of America, A.F.L.-C.I.O. (Exhibits 3, 4) He has alleged that although duly qualified,

[1] Plaintiff's witnesses included, in addition to himself, two fellow employees and one former employee. Plaintiff also called defendant's former Cargo Manager Innes and called defendant's witnesses Glynn (Personnel Manager) and Sharma (defendant's Cargo Manager), as his own witnesses; Defendant called Personnel Manager Glynn, Cargo Manager Sharma, former Cargo Manager Innes, and the independent polygraph tester Kaufman. Plaintiff's Exhibits in evidence included Exhibits 1 through 11, and 13 through 15. Defendant's Exhibits in evidence included Exhibits A through K, N through Y, AD, AF, AG, AI, AK, AM and AN. There were also additional exhibits marked for identification by both sides.

he had been denied the position of Cargo Agent, the next higher rank under the agreement.

The Court found that this allegation was untrue. Plaintiff was denied the position because he was unable to meet the standards of qualification for the job of Cargo Agent, which included ability to pass a typing test at a speed of 45 words per minute. (Exhibits 3, 4, respectively, pp. 5, 8, 9; Exhibits L, N-T (inclusive); Tr. 71-81, 234-235, 280-283, 384) The Court found that the job qualification test, as set forth in the Union agreement, was entirely proper, fairly administered and did not involve in any respect an element of racial discrimination. (Tr. 289-290) Moreover, it was found that from time to time various other black employees had passed this typing test. (Tr. 156-157, 219, 231-232, 278-280, 355-356)

Following plaintiff's failure to qualify as a Cargo Agent, on February 24, 1971, he filed a complaint against defendant with the State Division of Human Rights, which was dismissed by the Division on a finding of no probable cause on May 14, 1971, and affirmed on appeal on March 21, 1972. (Tr. 79-81, 235; Exhibits R, S, T)

In the latter part of 1970, another incident alleged by plaintiff relates to an informal meeting between a representative of a local community action group known as the Jamaica Anti-Poverty Program, plaintiff, another black employee and defendant's Personnel Manager. The Court found that while a discussion had taken place as to the prospect of employing more blacks by defendant, nothing arose at that meeting or thereafter which, in any respect, involved a discriminatory action by defendant. The record shows, moreover, that the community action representative never even contacted the Personnel Manager after this initial meeting. (Tr. 32-34, 88-89) The Court also observed that economic conditions not long thereafter had resulted

in close to a fifty per cent reduction in defendant's work force at the airport. (Tr. 33)

The Court, moreover, rejected allegations of discriminatory retaliation by defendant's management employees, finding that plaintiff's problems had arisen from his inability to accept supervision, his insubordination and general difficulties in his job relationships. (Tr. 59, 109-110, 173-176, 253-254, 353-355, 379; Exhibits K, Y, pp. 2, 3)

Plaintiff claimed discrimination arising from failure to receive an equitable portion of overtime assignments. The Court found that plaintiff had processed a complaint through the grievance machinery of the collective agreement and the matter had been fully adjusted, and further found that the incident did not in any respect relate to plaintiff's race. (Tr. 248-249)

Plaintiff has also raised several security incidents at the airport in 1970, as discriminatory. One involved the use by defendant of a "check-package" technique from time to time in order to test the honesty of employees entrusted with the delivery of interline shipments from the warehouse of one airline to another. The Court found that whatever the efficacy of the method, no question of racial discrimination was involved. (Exhibit Y, pp. 3-5; Tr. 118-122, 269-271)

Later the same year, a shipment of knitwear apparently had been stolen from defendant's airport warehouse. Plaintiff had been suspected and was asked by the police to submit to a polygraph test. When plaintiff refused to release defendant, the test was never actually completed. The Court found that he had not been suspected because he was black, nor had he been asked to take the test because of his race.[2] (Tr. 112-118, 148-149, 241-245, 260-261, 267-269, 274-276, 331-335, 372-373; Exhibit 6)

[2] On police initiative, polygraph tests were given from time to time to defendant's white employees. (Tr. 147-149, 275, 348-350)

Plaintiff has also asserted defendant's disciplinary actions relating to absenteeism as discriminatory. The record shows that plaintiff had been absent some 35½ days in 1969, and 16½ days during the first half of 1970, alone. (Exhibit F) Moreover, plaintiff had been warned that such absenteeism, if continued, could lead to termination. Warnings, notwithstanding, by the year end 1970, plaintiff had been absent 29 days (plus partial absences equivalent to five additional days) and, as a consequence, his discharge had been recommended by the Cargo Manager. (Exhibit G) However, he was not actually discharged at that time but, rather, was given a further warning.

In May, 1971, plaintiff's absentee record again came under review. It was found that his 34 absences in 1970 included 11 in conjunction with scheduled days off. (Tr. 96-98) Moreover, he had been late 36 times without explanation and twice had been warned to give proper notice on the occasion of absence due to illness. Defendant had also ascertained that in the first five months of 1971, plaintiff had already taken eight days of sick leave, three of which were in conjunction with scheduled days off and had been late eight times without explanation. (Exhibit I) He was advised by defendant that should he be absent again prior to a forthcoming voluntary leave of absence in July, 1971, he would be terminated. (Exhibit H) In 1972, plaintiff was again charged with excessive absenteeism, arising from his past record and nine absences which had occurred over a period from January through May 18, 1972, and was discharged from employment on May 18, 1972. (Exhibit 9; Tr. 22-30, 38-39) In this connection, defendant had taken such action under the discipline clauses of the collective agreement. (Exhibits 3, 4, respectively, Article XXI, p.25; see also Article XVIII §6, p.22) Thereafter, plaintiff exhausted his remedies under the grievance machinery and,

on arbitration before an adjustment board, was ordered reinstated with full back pay. (Exhibit A) No issue of discrimination was raised in the arbitration proceeding, nor was it involved in the Referee's decision.

Following extensive and detailed consideration of plaintiff's allegations relating to discipline for absenteeism, the Court found that neither the warnings, nor the eventual discharge involved racial discrimination. The Court further found that not only had defendant taken similar action against several white employees within the same time span as against plaintiff, but also had taken disciplinary measures from time to time against other white employees involving improper absenteeism. (Tr. 41-46, 292-294. Exhibits B and C) Moreover, immediately following his discharge in May, 1972, plaintiff filed a complaint with the State Division of Human Rights once again. This complaint was also dismissed by the Division on a finding of no probable cause. (Exhibit V) No appeal was taken by plaintiff from the Division's determination.

Plaintiff raised other minor incidents as evidence of discrimination. Among these was a warning plaintiff had received arising from numerous garnishments which had been served on defendant. The Court found no evidence of racial motivation. (Tr. 273, 316-320)

There was also an incident involving plaintiff's complaint against fellow employees for gambling. (Tr. 247-248) The Court found that the Company had responded to the complaint, and no element of racial discrimination was involved.

As an airline employee, plaintiff had been eligible to receive free airline passes, subject to appropriate regulations. In 1974, plaintiff won two free roundtrip transatlantic airline tickets at defendant's Christmas party

drawing. Plaintiff alleged that he should have received free land accommodations as well, and the prize he won amounted to a discriminatory act.[3] The Court found that no element of discrimination was involved. (Tr. 61-66, 200-201, 339, 373-375, 380-382)

Plaintiff also alleged discrimination with respect to trips to Australia and Mexico.

In the instance of plaintiff's request for free transportation to Australia, he had been told that his proposal to take such a round trip within the space of four days was entirely unreasonable on his part, and if he were to take such a trip, he would be disciplined if he overstayed authorized leave. (Exhibit J; Tr. 60-61, 265)

With respect to a proposed trip to Mexico, plaintiff had sought two free roundtrip tickets for himself and his wife (prospective second wife) at a time when defendant believed him to be unmarried. (Tr. 271-273, 375-377, 379-380) The Court found that no element of discrimination arose merely because defendant sought confirmation of plaintiff's marital status in order to establish his wife's eligibility for free transportation under applicable regulations.

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[3] This allegation is not to be found in the complaint. It was brought forth for the first time at trial. Moreover, apart from any question of timeliness, defendant has never conceded that the giving of prizes at a Christmas party falls within any statutory protection. See 42 U.S.C. 2000e-2(a).

ARGUMENT

I.

Appellant has failed to establish that the findings of fact below are clearly erroneous.

Plaintiff, represented by counsel below, adduced testimony through numerous witnesses, including himself, and defendant adduced testimony through four witnesses.[4] Trial before Judge John F. Dooling proceeded over a period of two full days. The transcript of testimony involves more than 400 pages. Additionally, extensive written documents were adduced in evidence by both sides. Thus, the trial judge had the witnesses before him throughout the trial, and was able to consider thereby their demeanor as witnesses in determining their credibility.

In actions tried without jury, the appellate court cannot set aside findings of fact of the District Court unless "clearly erroneous". Rule 52(a), Federal Rules of Civil Procedure. Moreover, the rule specifies that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

In *Graver Tank & Manufacturing Co.* v. *Linde Air Products Company*, 336 U.S. 271, 275, 69 S.Ct. 535, 537, 538, 93 L.Ed. 672, 676, 677 (1949) the Supreme Court stated:

> "The rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only clearly erroneous findings."

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[4] Note 1, *supra* at p. 3.

In *United States* v. *Aluminum Co. of America et al.*, 148 F.2d 416 (2nd Cir. 1945), at 433, Judge Learned Hand stated:

* * *

> "Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases."

Under the rule, plaintiff has a clear burden to establish that any findings of the court objected to are "clearly erroneous". This burden cannot be met by plaintiff through mere argument. Rather, plaintiff is necessarily bound to bring forth the specific evidence with respect to which it is urged that erroneous findings have been made. This has not been done. *McCaw* v. *Fase*, 216 F.2d 700, 703 (9th Cir. 1954), *cert. denied*, 348 U.S. 927, 75 S.Ct. 340, 99 L.Ed. 726 (1955); *Keneipp* v. *U.S.*, 203 F.2d 397, 398 (D.C. Cir. 1953).

Indeed a full review of the findings of the District Court and the evidentiary record as a whole shows conclusively that the findings are fully supported by the record and cannot possibly be determined to be clearly erroneous. *U.S.* v. *National Association of Real Estate Boards*, 339 U.S. 485, 495, 496, 70 S.Ct. 711, 717, 94 L.Ed. 1007, 1016 (1950); *Smith* v. *Delta Air Lines, Inc.*, 486 F.2d 512, 514 (5th Cir. 1973).

Plaintiff's case below and the appeal herein is based upon dubious and unsupported inferences, all of which were substantially overcome by the evidentiary record and the extensive and detailed findings of the Court with respect

thereto. *International Railways of Central America* v. *United Brands, Inc.*, 532 F.2d 231, 241, 242, 249 (2nd Cir. 1976), *cert. denied*, 97 S.Ct. 101 (1976).

Moreover, plaintiff appears to be pressing his appeal without regard whatever for the evidentiary record adduced below, as though he had a right to *de novo* consideration on review. This, however, is not the law.

In *Zenith Radio Corp.* v. *Hazeltine Research Inc.*, 395 U.S. 100, 123, 89A, S.Ct. 1562, 1576, 23 L.Ed.2d 129, 148 (1969), the Supreme Court observed:[5]

> ". . . In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo* . . ."

Nor, indeed, may plaintiff seek review in the mere hope that the appellate court may give the facts a different construction or interpretation. To the contrary, the courts have held that they are not given such a choice on appeal because they are mandated not to set aside findings of fact unless "clearly erroneous". *Hughes Tool Co.* v. *Varel Mfg. Co.*, 336 F.2d 61, 62 (5th Cir. 1964).

In *Lassiter* v. *Fleming*, 473 F.2d 1374, 1375 (2nd Cir. 1973), this Court, *per curiam*, stated:

> ". . . On appeal, plaintiff challenges certain critical factual inferences drawn by the judge, which, he

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[5] See also *U.S.* v. *National Association of Real Estate Boards*, *supra*, 495, 496, where the Court observed:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. See *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342; *United States* v. *Gypsum Co.*, 333 U.S. 364, 394-395. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous'."

> argues, were altogether unwarranted by the evidence. Where factual findings are challenged, however, we may not set them aside 'unless clearly erroneous.' Fed.R.Civ. P. 52(a). Although counsel have continued in this court their zealous and highly competent efforts on plaintiff's behalf, we do not see how we can, on this record, do anything but affirm."

In short, so far as the findings are concerned, the appeal herein is governed by the "clearly erroneous" rule, and plaintiff is without right to seek a retrial of the facts in the appellate court.

Moreover, nowhere has plaintiff established, on the record as a whole, that any mistake has been made by the trial court. Rather, he has continued to reassert arguments made below, or otherwise to argue or allege facts without regard to the record adduced in the trial court. Indeed, plaintiff has not shown that a single finding of fact made by the trial court is erroneous, nor has he established that these findings, whether singly or taken as a whole, in any respect amounted to a mistake. *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 394, 395, 68 S.Ct. 525, 541, 542, 92 L.Ed. 746, 765, 766 (1948), *rehearing denied*, 333 U.S. 869 (1948); *Prince & Packer Manufacturing Co.* v. *Berg Manufacturing & Sales Corp.*, 419 F.2d 34 (7th Cir. 1969).

Under these circumstances, there is surely no basis for setting aside the findings of fact of the trial court under the "clearly erroneous" rule.

II.

Plaintiff has otherwise failed to establish any ground for reversal.

Even apart from the "clearly erroneous" rule, plaintiff has failed to show any ground for reversal of the District Court.

The subsidiary findings of fact by the trial court based upon oral testimony and documentary exhibits have not even been challenged. Under such circumstances, plaintiff is surely not in a position to attack the inferences and conclusions of the trial court drawn from findings on the record as a whole. Nor, indeed, has plaintiff been able to show any grounds for independent review by this Court.

Accordingly, *arguendo,* even were the Court to determine that it was not limited by the "clearly erroneous" rule, the result necessarily would be the same, for there is nothing in the record in any event which would justify a decision different than that reached by the trial court. Cf. *Humphrey* v. *Southwestern Cement Co.,* 488 F.2d 691, 695 (5th Cir. 1974), where the Court stated:

> ". . . The long and the short of the matter here is that plaintiff failed to prove racial discrimination in the award of the position in question. There was simply no evidentiary basis on which the district court could decide the case in favor of plaintiff. . ."

In any event, in the case at bar, plaintiff has failed to establish on the record as a whole, any ground which would require this Court to disregard or otherwise reverse the findings and conclusions of the Court below.

CONCLUSION

For all the foregoing reasons, the order and judgment of the District Court dismissing the action on the merits should be affirmed.

Respectfully submitted,

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May 19, 1977.

ADDENDUM

Civil Rights Act of 1866

42 U.S.C. §1981

§1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Civil Rights Act of 1964, as amended

42 U.S.C. §2000e *et seq.*

§2000e-2.

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

§2000e-3.

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an em-

ployment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Federal Rules of Civil Procedure

Rule 52(a)

• • •

". . . Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

AFFIDAVIT OF SERVICE BY MAIL

State of New York,
City of New York,
County of New York, ss.:

ALFRED BUSH, JR., being duly sworn, deposes and says that he is over 18 years of age. That on the 19th day of May, 1977, he served 2 copies of Brief on Behalf of Defendant-Appelle upon:

ROBERT HIGH, ESQ.
111-12 Corona Avenue
Corona, New York 11368

By depositing 2 copies of the same securely enclosed in a post-paid wrapper in a branch depository maintained and exclusively controlled by the United States Post Office at Canal & Church Street, N.Y.C., addressed to said attorney for the above named, that being the address within the state designated by them for that purpose upon the preceding papers as the place where they regularly kept office and at which place they regularly received mail.

Sworn to before me this
19th day of May, 1977

Sylvia Morris

SYLVIA MORRIS
Notary Public, State of New York
No. 31-4526651
Qualified in New York County
Commission Expires March 30, 1978

Alfred Bush, Jr.
ALFRED BUSH, JR.